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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

RECORD DATA INC., a corporation, PETITIONER
vs.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA (JACK F. NEAL, et als, REAL PARTIES IN INTEREST), RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

DENNIS E. O'DELL,
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Counsel of Record for
Respondent

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QUESTIONS PRESENTED FOR REVIEW

The questions presented to the Court for review are:

Ultimate Question

1. Whether the United States Court of Appeals for the Eleventh Circuit erred in refusing to review the remand order of the United States District Court for the Northern District of Alabama, Northeastern Division, wherein the District Court Judge expressly found that the action was removed to the Federal District Court "improvidently and without jurisdiction"?

Subsidiary Questions

2. Whether the United States District Court for the Northern District of Alabama properly remanded the herein action under the Fair Labor Standards Act of 1938 as amended, 29 U.S.C., § 201, et seq. to the State Court where originally filed.

3. Whether there is an express provision by an Act of Congress forbidding removal of actions brought pursuant to the Fair Labor Standards Act of 1938 as amended, 29 U.S.C., § 201-219?

TABLE OF CONTENTS AND AUTHORITIES

A. Table of Contents

	Page
1. Questions presented for review	i
2. Table of Contents and Authorities	iii
A. Table of Contents . . .	iii
B. Table of Authorities . .	iii
3. Summary of the Argument . .	viii
4. Argument	1
5. Conclusion	29
6. Appendix	A-1

B. Table of Authorities

Cases	Page
Baldwin v. Sears, Roebuck & Co., 667 F.2d 458 (5th Cir. 1982).	27
Garner v. Mengel Co., 50 F.Supp. 794 (N.C. Ky. 1943).	26
Goldkist, Inc. v. Black, CV 80-M-1133-W (N.D. Ala. 1980). (unpublished order).	18

	Page
Gravitt v. Southwestern Bell Telephone Company, 430 U.S. 723, 52 L.Ed. 2d, 1 97 S.Ct. 1439 (1977).	3, 6, 7, 8 9, 10, ix
Hill v. Moss-America, Inc., 309 F. Supp. 1175 (N.D. Miss. 1970).	18, 24, 28
In re Merrimack Mutual Fire Insurance Co. 587 F.2d 642 (5th Cir. 1978).	8, 9, 10, 12, 13 ix
In re Weaver, 610 F. 2d 335 (5th Cir. 1980)	12
Johnson v. Butler Bros., 162 F. 2d 87 (8th Cir. 1947)	27
Live and Let Live, Inc. v. Carlsbeg Mobile Home Properties, 592 F. 2d 846 (5th Cir. 1979)	11
London v. United States Fire Ins. Co., 531 F. 2d 257 (5th Cir. 1979)	11
Price v. Asplundth Tree Expert Co., A. No. 64-284-S (N.D. Ala. 1964) (unpublished order).	18
Rossi v. Singer Sewing Machines Co., 127 F. Supp 53 (D. Conn. 1954).	25

	Page
Royal v. State Farm Fire and Casualty Co. 685 F. 2d 124 (5th Cir. 1982)	1, 3
Self v. Self, 614 F. 2d 1026 (5th Cir. 1980)	12
Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 46 L.Ed. 2d, 542, 96 S.Ct. 584 (1976).	2, 3, 4, 5, 6, 7, 8, 10 11, 12, 13, 14 viii
Volvo of America Corporation v. Schwarzer, 429 U.S. 1331, 46 L.Ed 2d 273, 97 S. Ct. 285 (1976).	3, 5 6
Wilkins v. Renault Southwest, Inc., 227 F. Supp. 647 (N..D. Tex. 1964).	18, 25

Page

Statutory Provisions

28 U.S.C. § 1332	5
28 U.S.C. § 1441 et seq.	x
28 U.S.C. § 1441(a)	ix, 17, 22, 25
28 U.S.C. § 1443	11
28 U.S.C. § 1445	23
28 U.S.C. § 1447(c)	viii, ix, x, 1, 2, 4, 5, 6, 7, 9, 13 20
28 U.S.C. § 1447(d)	x 1, 2, 3, 4, 6, 7, 13
29 U.S.C. § 201 et seq.	16, 17, 21
29 U.S.C. 216	18, 21, 24, 28
29 U.S.C. 621	27

	Page
29 U.S.C. 626(c)	28

Textbooks and Other Authorities

American Law Institute "Study of the Division of Jurisdiction Between State and Federal Courts" (1969)	24
Senate Report Number 1830, 85th Congress 2d Session, 1958	23
172 American Law Reports, Annotated 1157	27
10 American Law Reports, Annotated 919	20

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eleventh Circuit was prohibited from reviewing the remand order of a district court and, therefore, the petition for writ of certiorari is due to be denied. The grounds upon which the District Court relied in entering its order remanding this action to the State Court are clear and unambiguous and fall strictly and expressly within the provisions of 28 U.S.C. § 1447(c). The District Court expressly based it order to remand to the State Court upon the grounds that the action was removed "improvidently and without jurisdiction". The Court of Appeals was not authorized to make an inquiry into the merits of the decision of the District Court remanding the action to State Court. It is clear that the instant action differs both procedurally and factually from the Thermtron decision upon

which the Petitioner relies in alleging error in the Court of Appeals refusal to review the remand order of the District Court. To entertain the mandamus requested by the Petitioner, the Eleventh Circuit Court of Appeals would have had to act in direct conflict with binding authority of the Supreme Court's decision in Gravitt v. Southwestern Bell Telephone Company, 430 U.S. 723, and also in direct conflict with the Merrimack case decided by the United States Court of Appeals for the Fifth Circuit and representing binding authority on the Eleventh Circuit.

The District Court properly invoked the grounds established in 28 U.S.C. §1447(c) in that it expressly found that in its district, the "may be maintained" language of the FLSA constitutes an expressed provision against removal within the meaning of 28 U.S.C. § 1441(a).

Succinctly stated, the Respondent's position is that the petition for writ of certiorari is due to be denied because the Court of Appeals was prohibited from reviewing the remand order of the District Court by virtue of 28 U.S.C. § 1447(d) and the binding authority of the decisions of United States Supreme Court and the United States Court of Appeals for the Fifth Circuit. The remand order of the District Court even if erroneous in its analysis, cannot be reviewed by appeal, mandamus or otherwise, by virtue of the invocation of the statutory language of 28 U.S.C. §1447(c). Respondent further submits that the District Court acted within its proper authority in remanding the action to State Court because established precedence of the United States District Court for the Northern District of Alabama is that an action brought under the Fair Labor Standards Act of 1938, as amended is not removable pursuant to 28 U.S.C. § 1441, et seq.

ARGUMENT

1. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT WAS BARRED FROM REVIEWING THE ORDER OF A DISTRICT COURT REMANDING THE ACTION TO STATE COURT BECAUSE THE DISTRICT COURT JUDGE EXPRESSLY FOUND THE ACTION WAS REMOVED FROM THE STATE COURT "IMPROVIDENTLY AND WITHOUT JURISDICTION".

The bar against reviewing a remand order is found in § 1447(d) of Title 28, U.S.C., and the grounds upon which a case may be remanded from Federal Court to State Court is contained in § 1447(c). Because the Petitioner sought to review by mandamus an order of the District Court remanding the action to State Court, the Court of Appeals was presented with a threshold question of jurisdiction. Royal v. State Farm and Casualty, 685 F. 2d 124 and 125. For authority to review the remand order, the

Petitioner has heavily relied upon the case of Thermtrom Products, Inc. v. Hermansdorfer, 423 U.S. 336. In that decision, this Court reversed the Sixth Circuit Court of Appeals which had held a remand order was absolutely non-reviewable. The United States Supreme Court authorized review of the District Court's remand order where said order rested solely upon the ground that the District Court's docket was overcrowded. Prior to the rendition by this Court of the Thermtron, supra, § 1447(d) of Title 28, U.S.C., operated as an absolute bar to review of remand orders by any method. In Thermtron, supra, the Supreme Court through Mr. Justice White, provided for an inquiry by the appellate court into the question of whether or not a remand order was issued for reasons not authorized by § 1447(c). However, a close reading of the Thermtron case and cases

following it clearly shows that the well-established general rule prohibiting review of remand orders set out by § 1447(d) remains intact. Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, Gravitt v. Southwestern Bell Telephone Company, 430 U.S. 723, Volvo of America Corporation v. Schwarzer, 429 U.S., 1331, Royal v. State Farm Fire and Casualty Company, 685 F.2d 124 (5th Cir. 1982).

The express language of the District Court in remanding the case to State Court was the "action was removed improvidently and without jurisdiction. . ." (Appendix at 2). The Petitioner would have the Thermtron doctrine extended to allow a Court of Appeals to review the analysis upon which a District Court has based its expressed findings that an action was removed from State Court improvidently and without jurisdiction. The Respondent submits that the

Thermtron doctrine has not and should not be given the broad application suggested by the Petitioner. The Respondent concedes that prior to Thermtron decision, the prohibition against review of remand orders was absolute and, thereafter only a limited inquiry was authorized by that case.

The Thermtron court stated:

> "It is unquestioned in this case and conceded by Petitioners that this section [§ 1447(d)] prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ. This has been the established rule under § 1447(d) and its predecessor stretching back to 1887. (Citations omitted). If a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction' his order is not subject to challenge in the Court of Appeals by appeal, by mandamus, or otherwise." Thermtron, supra at 343.

Contrary to what is submitted by the Petitioner, the inquiry "licensed" by Thermtron is not whether a remand is based

upon the 1447(c) grounds (improvidently and without jurisdiction), but the inquiry is whether the remand order purports to be upon the proper grounds. Thermtron, supra.

In Volvo of America Corporation v. Schwarzer, 429 U.S. 1331, Mr. Justice Rehnquist, sitting as Circuit Justice, denied an application to stay an order of the United States District Court for the Northern District of California remanding a case to state court, where it was alleged that the district court erroneously applied the law in determining a lack of diversity under 28 U.S.C. § 1332. Justice Rehnquist stated that even if the district court was wrong in its analysis, it clearly stated that it considered itself without jurisdiction and cited the specific language of 28 U.S.C. 1447(c) ("removed improvidently and without jurisdiction"). Justice Rehnquist went on to say "review of this order,

therefore, is presumptively barred by the operation of 28 U.S.C. § 1447(d). . . ".

It was further held that

> "Thermtron is of no help to applicant as the remand was explicitly based on an allegedly erroneous finding that the court 'does not have jurisdiction of this action'". (citations omitted). Volvo of America Corporation v. Schwarzer, supra at 333.

In 1977, this Court again spoke on the issue of non-reviewability of a motion to remand granted under § 1447(c). Gravitt v. Southwestern Bell Telephone Company, 430 U.S. 723. The United States Court of Appeals for the Fifth Circuit by mandamus ordered a Texas District Court to vacate its remand order because the latter had employed erroneous principals in concluding that it was without jurisdiction as a result of incomplete diversity. In reversing the Fifth Circuit, the Gravitt court held that when a district court determines that the action was removed,

"improvidently and without jurisdiction. . . and when a remand has been ordered on these grounds, 28 U.S.C. § 1447(d) unmistakably commands that the order 'remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise. . .'". Gravitt, supra at 723.

The Court went on to say:

"Thermtron did not question but re-emphasized the rule that § 1447(c) remands are not reviewable." Gravitt, supra at 724.

The instant action came before the United States Court of Appeals for the Eleventh Circuit in the exact posture as the Gravitt case came to the Fifth Circuit Court of Appeals. While the Gravitt case involved questions of incomplete diversity and the instant action involves removability of an action under the Fair Labor Standards Act, each respective Court of Appeals was presented with the question of whether or not it could review the analysis upon which a District Court had based its express

finding that an action had been removed to Federal Court improvidently and without jurisdiction. The Supreme Court of the United States reversed the United States Court of Appeals for the Fifth Circuit in the Gravitt case for reviewing the alleged erroneous principals employed by the District Court in remanding the action. Clearly, had the Court of Appeals for the Eleventh Circuit entertained the requested mandamus of the Petitioner, it would have acted in direct conflict with the binding authority of this Court's holding in Gravitt.

It is clear from subsequent decisions that the majority opinion in Thermtron provides little guidance concerning the removability of an action. In Re Merrimack Mutual Fire Insurance Company, 587 F.2d 642 (5th Cir., 1978).

This Court has clearly indicated that no rule was created which allows review of a remand order even though a Court of Appeals determines that error has occurred in reaching the 1447(c) grounds.

Following the Gravitt decision, the United States Court of Appeals for the Fifth Circuit decided In Re Merrimack Mutual Fire Insurance Company, 587 F.2d 642 (5th Cir., 1978). In refusing to issue mandamus, the Court of Appeals in Merrimack found that the Thermtron decision presented

> "only a narrow rule that was intended to be limited to the extreme facts of that case, in which a district judge stated openly that he was relying on a non-1447(c) ground for remand. The Thermtron court never stated that it was willing to construe the seemingly absolute bar of § 1447[(c)] (sic) as extending beyond the exceptional facts of that case. . ." In Re Merrimack Mutual Fire Insurance Company, supra, at 647.

The Merrimack decision makes it clear that the mere invocation of § 1447(c) by the

District Court "will preclude review of a remand order no matter how clearly erroneously the order appears on its face." In Re Merrimack Mutual Fire Insurance Company, supra, at 648.

The Court went on to say:

> "After Gravitt, it appears that Thermtron was intended to be strictly limited to those cases in which a District Judge has actually stated that he is not relying on § 1447(c) in ordering a remand." In Re Merrimack Mutual Fire Insurance Company, supra, at 648.

In order for the United States Court of Appeals for the Eleventh Circuit to grant the mandamus sought by the Petitioner, it would have had to rule in a manner directly in conflict with binding authority from the Fifth Circuit Court of Appeals as established by the Merrimack decision.

Because Judge Haltom has expressly found that the action was removed "improvidently and without jurisdiction"

(Appendix at 2), the Court of Appeals for the Eleventh Circuit could not consider whether the District Court was correct in its view of lack of jurisdiction. This is true regardless of the type of litigation before the Court (except § 1443 Civil Rights cases). Live and Let Live v. Carlsberg Mobile Home Properties, Limited, 592 F.2d 846 (5th Cir., 1979).

It is also true that unless the issue of reviewability of the remand order of the District Court was answered in a manner favorable to the Petitioner, any further consideration of any other issue put forth by the Petitioner would be improper and unwarranted. London v. United States Fire Insurance Company, 531 F.2d 257 (5th Cir., 1976). The London v. United States Fire Insurance Company case constitutes another reaffirmation that the Thermtron case is only applicable to certain extreme situa-

tions which are not present in the case before this court.

The Respondent submits that the District Court was clear and unambiguous for stating the reasons for its remand order. Even if it was not clear and unambiguous, however, the ruling in the Merrimack case holds that the appellate court may not use a writ of mandamus to compel the District Court to state its reasons for remanding in clearer terms. In Re Merrimack Mutual Fire Insurance Company, supra. The Merrimack decision was further followed and supported in the case of In Re Weaver, 16 F.2d 335 (5th Cir., 1980). See also Self v. Self, 614 F.2d 1026 (5th Cir., 1980).

It is clear that the case before this Court is quite a different case both procedurally and factually from the limited circumstances found in the Thermtron decision. Therefore, the refusal of the

Court of Appeals to issue the writ of mandamus was proper. No inquiry is authorized by statutory or case law into the merits of the decision of the District Court remanding this action to the state court. The grounds upon which the District Court relied in entering its remand order are clear and unambiguous and fall strictly and expressly within the provisions of 28 U.S.C. § 1447(c).

In the Merrimack decision, we find the following:

> "The purpose of the 1447(d) bar on appellate review of remand orders is to avoid delay in reaching the merits in a case because of 'protracted litigation' over whether the case is in the proper court." (Citing Thermtron Products, supra). Merrimack, supra, at 648.

The dissenting opinion in the Thermtron case, through Mr. Justice Rehnquist, outlined the accepted congressional purpose in barring review of all remand orders. The

Justice stated that the bar is to prevent additional delays which result when a removing party seeks appellate reconsideration of a remand order.

> "The removal jurisdiction extended by Congress works a significant interference in the conduct of litigation commenced in state court. While Congress felt that making available a federal forum in appropriate instances justifies some such interruption and delay, it obviously thought it equally important that when removal to a federal court is not warranted, the case should be returned to the state court as expeditiously as possible. If this balanced concern is disregarded, federal removal provisions may become a device affording litigants a means of substantially delaying justice.
>
> It is clear that the ability to invoke appellate review, even if ultimately unavailing on the merits, provides a significant opportunity for additional delay. Congress decided that this possibility was an unacceptable source of additional delay and therefore, made the district courts the final arbiters of whether Congress intended that specific actions were to be tried in a federal court." Thermtron, supra at 354, 355 (Dissenting opinion).

The Respondent in the case at bar has experienced substantial delay in prosecuting its claim to final judgment as a result of the procedural availability of the removal statutes to the Petitioner. The action was begun in state court on April 15, 1982. Petitioner availed itself of a petition for removal to the District Court. Thereafter, the District Court's decision to remand the action to the state court was not entered until April 13, 1983, whereupon (Appendix at 2) whereupon the Petitioner sought reconsideration from the District Court. Upon the denial of the request for reconsideration by the District Court, the Petitioner then sought the extraordinary writ from the Eleventh Circuit Court of Appeals without success, and now seeks the writ of certiorari which presents the case at bar before this Court, all of which has resulted in lengthy delays, tremendous inconvenience,

expense and attorney's fees to the Respondent.

2. THIS ACTION UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, 29 U.S.C. §§ 201 ET SEQ., WAS PROPERLY REMANDED TO THE STATE COURT BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

The order to remand this action to the state court contains express language as follows:

> "It appearing to the court that this action was removed improvidently and without jurisdiction for the reasons stated in the Memorandum of Decision filed contemporaneously herewith, is it
>
> ORDERED, ADJUDGED and DECREED that this cause be and the same hereby is REMANDED to the Circuit Court of Madison County, Alabama, from whence it was removed." (Appendix at 2)

In Judge Haltom's memorandum of decision, the following narrowing of the issue is found:

> ". . . the narrow question left for the court to determine is whether there is an express provision by an Act of Congress forbidding removal of actions brought pursuant to the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (FLSA)." (Appendix at 4 and 6).

The District Court went on in its memorandum to recognize a continuing split in authority over the question of whether or not FLSA cases are removable. The memorandum goes on to explain that the split of authority hinges upon the language in FLSA permitting actions to be "maintained" in either federal or state court with the cases against removal treating the "maintained language of the FLSA as an express provision against removal within the meaning of 28 U.S.C. §1441(a). Judge Haltom then cites as precedence for the United States District for the Northern District of Alabama two unpublished orders involving remands to state court of FLSA cases. (Appendix at 11

and 12). Of particular import, the order of Judge McFadden in the Goldkist,Inc. case refers specifically to the "may be maintained" language of 29 U.S.C. § 216(b) which language the court adopts as an express provision against removal within the meaning of 28 U.S.C. § 1441(a).

Judge Lynn in the Price v. Asplundth Tree Expert Company case cites as authority for the District Court Wilkins v. Renault Southwest, Inc., 227 F.Supp. 647 (N.D. Tex. 1964) "and cases therein discussed and cited". (Appendix at 11).

The Petitioner in its petition to this Court cites with approval Hill v. Moss-American, Inc., 309 F.Supp. 1175 (N.D. Miss. 1970), which case admittedly allowed removal to stand in a FLSA suit. However, of greater significance is the language from Hill v. Moss- American, Inc., supra, quoted in the petition before this Court as follows:

> "Recognizing that the federal removal statute has been amended in 1948 and that since numerous federal courts were split on the issue before it and 'the choice for [it] is to follow [its] own rule, which is not yet settled by precedent within the district . . .'". (Petition for writ of Certiorari of Record Data at page 51, emphasis added)

Clearly, because of the continuing split on the issue of removal of FLSA cases, the United States District Court for the Northern District of Alabama has the right to choose to follow its own rule to allow or deny removal in FLSA cases as it deems appropriate. Petitioner itself verified this to be the case as is shown by the quoted material above.

It is clear then that the United States District Court for the Northern District of Alabama has made its own choice and that choice is to deny the removal to district court of a FLSA suit. The order remanding this action to the state court was a proper

decision according to the precedence established in the Northern District of Alabama. (Appendix at 11 and 12). Surely, in those courts which have adopted the view that the "may be maintained" language of the FLSA is an express provision by an Act of Congress forbidding removal of FLSA cases, remand orders are a proper exercise of authority as actions having been removed "improvidently and without jurisdiction" according to 28 U.S.C. § 1447(c). Hence, an examination of the merits of the decision by the District Court to remand this action to the State Court reveals that said order to remand was proper according to the view adopted by the United States District Court for the Northern District of Alabama concerning removability of FLSA cases.

3. <u>THERE IS AN EXPRESS PROVISION BY AN ACT OF CONGRESS FORBIDDING REMOVAL OF ACTIONS BROUGHT PURSUANT TO THE PROVISIONS</u>

OF THE FAIR LABOR STANDARDS ACT OF 1938, 29 U.S.C. §§ 201-219.

Respondent adopts the view outlined in the memorandum of decision of Judge Haltom entered contemporaneously with his remand order of April 13, 1983 (Appendix at 4), wherein Judge Haltom indicated that the District Court would have original jurisdiction over this action under 29 U.S.C. § 216(b) and that this District Court is the District Court of the United States for the jurisdiction over this action under 29 U.S.C. § 216(b) and that this District Court is the District Court of the United States for the District and Division embracing the place where such action was pending in State Court. Respondent concedes the original jurisdiction of the District Court in a FLSA case and Respondent further concedes that Petitioner completed all mechanical and procedural requirements of the removal statute,

28 U.S.C. § 1441, et seq. and further discussion of these issues is unnecessary. However, Respondent does not purport to concede that by complying with the mechanical and procedural requirements of the removal statute, the action was providently and properly removed to the court below. As set out in the memordandum of decision of the District Court (Appendix at 4), there continues to exist substantial conflict among the authorities on the issue of removal of FLSA cases. It cannot be questioned that the 1948 amendment to the removal statute has not resulted in a resolution of the split of authority. The United States District for the Northern Division of Alabama has adopted the views which denies removal in FLSA cases which is supported by precedence as cited in Judge Haltom's memorandum of decisicn. In support of this view, the Respondent would first direct this

court to Senate Report Number 1830, US Code Cong and Adm News 3106, 85th Congress 2d Session, which pertains to the 1958 amendment to 28 U.S.C. § 1445 wherein congressional intent concerning removal in FLSA cases can be drawn:

> "Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similiar to the workman's compensation acts of the states. In the Jones Act, the Fair Labor Standards Act, and the Railway Employers Liability Act, all of which are in the nature of workman's compensation cases, the Congress has given the workman the option of filing his case in either the state court or the federal court. If filed in the state courts, the law prohibits the removal to the federal court. This proposed legislation accomplishes this same purpose and works the same privilege to workman who are entitled to compensation under the State Workman's Compensation Act--that is, the workman has the option to file his case in either the Federal or State court. If he files in the state court, it is not removable to the federal court." (Senate Report Number 1830, supra).

Additionally the American Law Institute in its "Study of the Division of Jurisdiction Between State and Federal Courts" (1969) proposed that actions by an employee to recover wages under § 16 of the FLSA (29 U.S.C. § 216) shall not be removed from a state court to a federal district court. The Institute further observed that the "may be maintained" language of the FLSA prohibits removal of such suits to federal district court and that its proposed provision would resolve the continuing controversery that remains unsettled over this.

According to the Hill v. Moss-American, Inc. case, 309 F.Supp. 1175 (N.D. Miss. 1970) because of the continuing split on the issue of removability of FLSA cases, each district court may choose for itself the view it wishes to follow in these types of cases. The Hill court makes it clear that the United States District Court for the

Northern District of Mississippi has adopted the view in favor of removal. However, the United States District Court for the Northern District of Alabama has adopted the view which would deny removal of FLSA suits.

Since the view of the Northern District of Alabama is the one that accepts the "may be maintained" language of the FLSA as an express provision against removal within the meaning of 28 U.S.C. §1441(a), the Respondent shall address the definition of the term "maintained". The word "maintained" as used in the FLSA has been held to mean that an action could be prosecuted in the court of the choice of the plaintiff in the action to a conclusion without removal Rossi v. Singer Sewing Machine Company, 127 F.Supp. 53 (D.C. Conn. 1953), Wilkins v. Renault Southwest, Inc., 227 F.Supp. 647 (N.D. Tex. 1964).

The term "maintained" carries a different meaning from "institute" or "begin" and implies that an action must be begun before it could be maintained. The definition of maintained has been stated as "continuing or persevering in or with; carrying on as maintaining an attack, a correspondence or a legal action." It has been described as to uphold, continue on foot and keep from collapse a suit already begun and several cases have defined a distinction between beginning and maintaining an action. Garner v. Mengel Company, 50 F.Supp. 794 (D.C. Ky. 1943), citing authorities. Garner went on to say that where the question of remand was doubtful, the doubt should be resolved in favor of remanding the action to state court. Garner v. Mengel Company, supra; 10 ALR Fed. 919 at 931.

It cannot be doubted that to allow removal of FLSA cases would further congest the dockets of the federal district court, and the removing employer could effect delays, increase the cost of litigation, and harass the plaintiff-employee through the use of the removal statutes. It cannot be doubted that the state courts of competent jurisdiction are well equipped to render speedy andjust decisions in FLSA cases. Johnson v. Butler Brothers, 162 F.2d 87, 172 ALR 1157.

The Petitioner cites as instructive the case of Baldwin v. Sears, Roebuck & Co., 667 F.2d 458 (5th Cir. 1982) which involved the removability of suits under the Age Discrimination and Employment Act (ADEA), 29 U.S.C. § 621, et seq. However, the language in the ADEA is substantially different from the language of the FLSA and can therefore be readily distinguished. Congress provided in

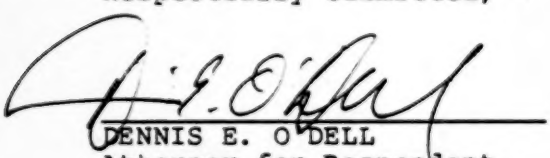
the ADEA the language "may bring a civil action in any court of competent jurisdiction", 29 U.S.C. § 626(c) as opposed to the language "may be maintained in any. . . court of competent jurisdiction. . . ", 29 U.S.C. § 216(b). Since "maintained" carries a different meaning from "institute" or "begin", cases involving the ADEA are not determinative in deciding matters concerning the FLSA.

The Respondent submits that the view which has been adopted by the United States District Court for the Northern District of Alabama which denies removal in FLSA cases is not contrary to the great weight of authority, but merely the adoption of the definition of the term "maintained", which the Hill v. Moss-American decision as cited in the brief of Record Data, establishes "is susceptible of two possible reasonable interpretations. . . ". Hill v. Moss-American, Inc., supra.

CONCLUSION

For the foregoing stated reasons, the Respondent respectfully submits that the petition of Record Data for writ of certiorari is due to be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Dennis E. O'Dell, counsel for the Respondent, Jack F. Neal, pursuant to Rules 28.2, 28.3 and 28.5, of the Rules of the United States Supreme Court, hereby certify that I have this day served three copies of the foregoing Brief for the Respondent upon

the following parties who are all the parties required to be served with the same: Frank K. Noojin, local counsel for Petitioner, Record Data, Inc., a corporation, 200 Terry Hutchens Building, P. O. Box 287, Huntsville, Alabama 35804, by mailing said copies to him by depositing the same in the United States Post Office with first class, priority, postage prepaid.

Done this 21st day of December, 1983.

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(Admission date 1/9/84)

STATE OF ALABAMA

COUNTY OF MADISON

SWORN TO AND SUBSCRIBED before me on this the 21st day of December, 1983.

NOTARY PUBLIC
State of Alabama at Large

APPENDIX

ORDER OF THE UNITED STATES
DISTRICT COURT FOR
THE NORTHERN DIVISION OF
ALABAMA, NORTHEASTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JACK F. NEAL Plaintiff -v- RECORD DATA, INC., a corporation, et al. Defendants	NO. CV 83-HM-5257-NE

O R D E R

It appearing to the court that this action was removed improvidently and without jurisdiction for the reasons stated in the Memorandum of Decision filed contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that this cause be and the same hereby is REMANDED to the Circuit Court of Madison County, Alabama, from whence it was removed.

The clerk of court is directed to send a certified copy of this order of remand to the clerk of such state court. Costs are taxed against the removing defendant.

DONE and ORDERED this 13th day of April, 1983.

/s/ E. B. Haltom, Jr.
E. B. HALTOM, JR.,
United States District Judge

MEMORANDUM OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHEASTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JACK F. NEAL, Plaintiff,	)
vs.	) NO.CV82-HM-5257-NE
RECORD DATA, INC., a corporation, et al. Defendants.	)

MEMORANDUM OF DECISION

This cause came on to be heard at the scheduled motion docket of this court upon motion of plaintiff to remand this cause to the Circuit Court of Madison County, Alabama. Plaintiff originally brought this action for overtime compensation under the Fair Labor Standards Act in the Circuit Court of Madison County, Alabama. Defendant timely petitioned this court for removal of the action to the Northern District of Alabama, Northeastern Division. In its petition defendant asserts that this court has original jurisdiction

over this action pursuant to the provisions of 28 U.S.C. §§1331 and 1332, and that this action is properly removed pursuant to the provisions of 28 U.S.C. §1441. Thereafter plaintiff filed a motion to remand this case to the Circuit Court of Madison County. In his motion plaintiff argues that this action may be maintained in any court of competent jurisdiction pursuant to 29 U.S.C.A. §216(b) and thus the action is not removable to federal district court under 28 U.S.C. §1441.

28 U.S.C. §1441(a) reads as follows:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Since it is clear that this court would have original jurisdiction over this action, see 29 U.S.C. §216(b), and that this court is admittedly the district court

of the United States for the district and division embracing the place where such action was pending, the narrow question left for the court to determine is whether there is an express provision by an Act of Congress forbidding removal of actions brought pursuant to the provisions of the Fair Labor Standards Act, 29 U.S.C. §§201-219 (FLSA).

The enforcement provisions of the FLSA are found in 29 U.S.C. §216, which provides in pertinent part as follows:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. §216(b).

There is substantial conflict among the authorities on the issue of removal of FLSA cases. See Bintrim v. Bruce-Merilees Electric Company, 520 F.Supp. 1026 (W.D. Pa. 1981); Griffin v. Hooper-Holmes Bureau,

Inc., 413 F..Supp. 107 (M. D. Fla. 1976); 1A J. Moore, Moore's Federal Practice ¶0.167[5] n.5 (2d ed. 1982) (impliedly criticizing those cases not allowing removal); 14 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure §3729 (1976). Disagreement centers around the interpretation of the language in 29 U.S.C. §216(b) providing that an action may be "maintained" against an employer in any Federal or State court of competent jurisdiction. One line of authority holds that by using the word "maintained" Congress intended not only that the action might be commenced in any court of competent jurisdiction, but that it could be continued until final judgment in the court in which it was commenced. Johnson v. Butler, 162 F. 2d 87 (8th Cir. 1947); Bintrim, 520 F. Supp. at 1027; Wilkins v. Renault Southwest, Inc., 227 F. Supp. 647 (N.D. Tex. 1964). These courts have therefore viewed this language as an express provision against removal within the meaning of 28 U.S.C. §1441(a).

On the other hand, other courts have allowed removal of FLSA cases, arguing that the language in the FLSA permitting actions to be "maintained" in either Federal or State court (1) implies only that actions may be commenced in either court, and does not grant a right to prosecute the case to conclusion in the chosen forum, and (2) does not constitute an express provision prohibiting removal, as is required by the general removal statute, 28 U.S.C. §1441(a). 14 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure §3729 (1976). See, Hill v. Moss-American, Inc., 309 F. Supp. 1175 (N. D. Miss. 1970).

Defendant has filed a scholarly brief in which it persuasively argues that the better view favors removability of FLSA cases. However, in Price v. Asplundth Tree Expert Company, CA No. 64-284-S (N.D. Ala. 1964) (unpublished order--copy attached) Judge Seybourn H. Lynne held that an action under the FLSA was due to be remanded as

improvidently removed. This holding was later followed by then Chief Judge Frank H. McFadden in Goldkist, Inc. v. Black, CV 80-M-1133-W (N.D. Ala. 1980) (unpublished order--copy attached). Conceding that there is meritorious argument to be made for removal of FLSA cases, this member of the court declines to depart from the precedent of the United States District Court for the Northern District of Alabama enumerated above until such time as a definitive ruling is made either by the United States Court of Appeals for the Eleventh Circuit or by the Supreme Court of the United States. Consequently, the court holds that, this action having been commenced in the state circuit court, it was improvidently removed to this court and must be remanded. In so holding, the court concurs with the decisions of Price and Goldkist, supra.

An appropriate order remanding this action to the Circuit Court of Madison County, Alabama will be entered.

/s/ E. B. Haltom, Jr.
E. B. HALTOM, JR.,
United States District
Judge

April 13, 1983

BOBBY JOE PRICE,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	
vs.	)	No. 64-284
	)	
ASPLUNDTH TREE EXPERT COMPANY, a corporation,	)	
	)	
Defendant.	)	

This cause, coming on to be heard, was submitted upon plaintiff's motion to remand. Brought under the provisions of the Fair Labor Standards Act, 29 U.S.C.A., Section 201, et seq., this action was improvidently removed to this court. Wilkins v. Renault Southwest, Inc., N.D., Texas, 227 F. Supp. 647 (1964), and cases therein discussed and cited.

It is, accordingly, ORDERED, ADJUDGED, and DECREED by the court that this action be and the same is hereby remanded to the Jefferson County Civil Court, from which it was removed.

Done, this the 9th day of June, 1964.

/s/ Seybourn H. Lynne
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

GOLDKIST, INC.,	)	
	)	
Petitioner	)	
	)	
vs.	)	CV 80-M-1133
	)	
KAREN C. BLACK,	)	
	)	
Defendant.	)	

ORDER

This cause came before the court on plaintiff's motion to remand this action to state court. Plaintiff seeks unpaid, overtime compensation from defendant employer under the Fair Labor Standards Act. Jurisdiction in the state court is based on 29 U.S.C. §216(b) which provides that plaintiff's action "may be maintained . . . in any Federal or State court of competent jurisdiction...." Plaintiff contends that the remand of this action to state court is proper because section 216(b) is an express provision by Congress authorizing plaintiff's suit, not only to be brought, but to be "maintained" in

state court. The court is persuaded by plaintiff's argument and by the precedent of Judge Lynne in Price v. Asplundth Tree Expert Co., C.A. No. 64-284-S (N. D. Ala. 1964), remanding to state court a case arising out of the Fair Labor Standards Act.

Accordingly, it is ORDERED, ADJUDGED and DECREED that plaintiff's motion to remand this action to state court be, and the same hereby is, granted.

Done this 16th day of December, 1980.

/s/ Frank H. McFadden
Chief Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-7320

IN RE:

RECORD DATA, INC., a corporation,

Petitioner.

On Petition for Writ of Mandamus and/or Prohibition from the Northern District of Alabama

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Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus and other relief is taken under advisement. Petitioner, Record Data, Inc., is directed to file a brief in this court on or before June 13, 1983. Plaintiff Jack F. Neal, is directed to file a response on behalf of District Judge, together with a brief on or before June 20, 1983. Until

further order of this court the parties are enjoined from proceeding in the state court.

ORDER OF THE UNITED
STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-7320

IN RE:

RECORD DATA, INC., a corporation,

Petitioner.

On Petition for Writ of Mandamus and/or Prohibition from the Northern District of Alabama

---

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

BY THE COURT:

Concluding that the Court of Appeals has no jurisdiction to review the remand by mandamus or otherwise, the petition for mandamus and/or prohibition is denied. See 28 U.S.C. §1447(d).

The injunction, heretofore granted, from proceeding in state court is dissolved.